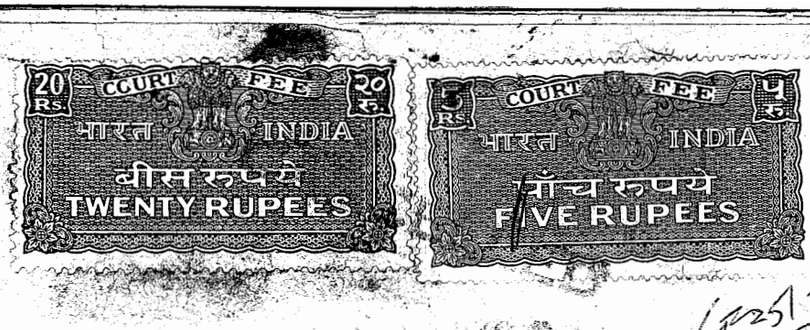


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(2)

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR.

Misc. Petition No. 1526 of 1992.

PETITIONER : Ajay Singh, aged about 51 years, son of Late Shri Virendra Singh, occupation-Contractor, resident of Haldi Kothi, Baliya (U.P.), at present Basna, District - Raipur (M.P.)

Versus

RESPONDENTS:

1. State of Madhya Pradesh, through : The Secretary, Department of Public Works, Govt. of M.P., Vallabh Bhawan, Bhopal (M.P.)

2. Superintending Engineer, National High-way Circle, Public Works Department, Raipur (M.P.)

3. Executive Engineer, National High-way Division, Public Works Department, Raipur (M.P.)

PETITION UNDER ARTICLE 226 & 227 OF THE CONSTITUTION OF INDIA.

AFR

**HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR**
**(Division Bench)**

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**CORAM : Hon'ble Shri A.K. Patnaik, CJ**
**& Hon'ble Shri Sunil Kumar Sinha, J.**

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**MISC. PETITION NO. 1526 OF 1992**

Ajay Singh

Versus

State of Madhya Pradesh (Now Chhattisgarh)
and others.

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Present : Mr. Manindra Shrivastava, Sr. Advocate with Mrs. Smitha Ghai, learned counsel for the petitioner.

Mr. V.V.S. Murthy, learned Dy. Advocate General with Mr. Sanjay S Agrawal, Govt. Advocate for the State of Chhattisgarh/respondents.

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**ORDER**
**(Passed on 23rd of June 2005)**

The following Order of the Court was passed by

**A.K. Patnaik, CJ:**

On National Highway No.6 at Kilometer No.135/2 a permanent bridge was constructed. On 14-02-1992 the Executive Engineer, National Highway Division, Raipur issued a notice inviting bids for collection of toll tax. On 13-03-1992 the auction amongst the bidders were held in which the bid of the petitioner was found to be highest at Rs.46.00 lakhs for one year, and a lease agreement was executed between the petitioner and the Executive Engineer on 06-04-1992. In the recital portion of the lease agreement it was mentioned that under Section 2 of the Indian Tolls Act, 1851 (*for short "the Act 1851")* the State Government had levied toll on the aforesaid bridge at the rates specified in the First Schedule appended to the lease agreement and Clause (3) of the said lease agreement provided

that the tolls shall be levied according to the rates fixed by the State Government on all persons, animals, vehicles and other things crossing the bridge other than those which have been exempted or which may be exempted under Section 4 of the Act 1851. The agreement was for a period of one year from 06/04/1992 to 05/04/1993. In the meanwhile, however, the Government of India, Ministry of Surface Transport (Roads Wing) issued a notification dated 19/02/1992 notifying the National Highways (Fees for use of permanent bridges) Rules, 1978 (*for short "the Rules*) made by the Central Government under Section 9 of the National Highways Act, 1956. Rule 3 of the Rules provided that fees on mechanical vehicles for the use of the permanent bridges at the rates specified in the Table to the Schedule annexed to the Rules shall be levied and paid to the executive agency on behalf of the Government of India. The rates of the fees that were specified in the Table to the Schedule annexed to the Rules were higher than those specified in the Schedule annexed to the aforesaid lease agreement entered into between the petitioner and the Executive Engineer. The petitioner claimed that he was entitled to collect the fees at the rates as specified in the Schedule annexed to the Rules made by the Central Government and not the fees at the rates as specified in the Schedule annexed to the lease agreement. When the said claim of the petitioner was resisted by the authorities, the petitioner filed this petition under Article 226/227 of the Constitution of India for appropriate relief.

2. On 07/05/1992 this Court admitted the writ petition and passed an interim order to the effect that until further orders, the petitioner shall be entitled to collect toll tax from the vehicles plying on National Highway No.6 at Km. No.135/2 at the rates fixed by the Central

Government in the Notification dated 19/02/1992 published in the Gazette of India Extraordinary Part-II Section 3 sub-section (ii).

3. When the petition was taken up for hearing today, Mr. Manindra Shrivastava learned counsel appearing for the petitioner submitted that it is not disputed that the concerned bridge at Km. No.135/2 is a permanent bridge located in the National Highway and that the National Highway Act, 1956 (*for short "the Act 1956"*) is applicable to the bridge in question. He further submitted that Section 7 of the Act 1956 provided that the Central Government may, by Notification in the Official Gazette, levy fees at such rates as may be laid down by Rules made in this behalf for services or benefits rendered in relation to the use of ferries, permanent bridges the cost of construction of each of which is more than rupees twenty-five lakhs and which are opened to traffic on or after the 1st day of April, 1976, temporary bridges and tunnels on National Highways and temporary bridges, etc in exercise of such powers. He further pointed out that under Section 9 of the Act 1956, the Central Government has been vested with the power to make Rules by Notification in the Official Gazette and under Section 9 (2)(b) of the Act 1956 it is provided that such Rules may provide for the rates at which fees for services rendered in relation to the use of, inter alia, ferries, permanent bridges, temporary bridges and tunnels on any National Highway may be levied, and the manner in which such fees shall be collected under Section 7 of the Act 1956. He further submitted that in exercise of its power under Sections 7 and 9 of the Act 1956, the Central Government made the Rules by the Notification dated 19/02/1992. He further submitted that sub - Rule (ii) of Rule 1 of the Rules provided that the rules shall come into force on the date of their publication in the Official Gazette and therefore, the Rules

came into force w.e.f. 19/02/1992 i.e. the date of publication in the Official Gazette. He submitted that since the aforesaid Rules were already in force, the petitioner was not only entitled but also obliged to collect the fees at the rates specified in the Table in the Schedule annexed to the Rules and not at the rates specified in the Schedule annexed to the lease agreement, even though the rates specified in the Table in the Schedule annexed to the Rules were higher than the rates specified in the Schedule annexed to the lease agreement. He submitted that under the lease agreement the petitioner was required to pay a total sum of Rs.46.00 lakhs to the State Government, which represented the bid amount, and the petitioner has already paid the said bid amount of Rs.46.00 lakhs. He submitted that since by the interim order passed by the Court on 07/05/1992 the petitioner was allowed to collect the toll tax at the rates fixed by the Central Government in the Table in the Schedule annexed to the Rules, the petitioner has, in fact, collected the fees from the different vehicles crossing the bridge for the whole one year at the said rates fixed in the Table in the Schedule annexed to the Rules and the Court will have to finally decide whether the petitioner was entitled to collect the toll at the said rates.

4. Mr. V.V.S. Murthy, learned Dy. Advocate General, appearing for the State of Chhattisgarh/respondents, on the other hand, relying on the averments in the reply filed on behalf of the respondents submitted that the notice inviting bids was issued on 14/02/1992 before the Rules were notified by the Central Government by the Notification dated 19/02/1992 and for this reason in the Schedule to the lease agreement executed between the petitioner and the Executive Engineer, the rates of the fees specified in the Table in the Schedule annexed to the said Rules

notified by the Central Government on 19/02/1992 were not mentioned and instead the rates as fixed by the State Government under the Act 1851 were mentioned. He vehemently argued that since the Rules made by the Central Government on 19/02/1992 were not in force at the time when the notice inviting bids was issued on 14/02/1992, the petitioner was entitled to collect only the rates as fixed by the State Government and as specified in the Schedule to the lease agreement.

**5.** We are unable to accept the said submission of Mr. Murthy. The position in law is that an agreement cannot over-ride the law. Section 57 of the Indian Contract Act, 1872 provides that where persons reciprocally promise, firstly to do certain things which are legal, and secondly, under specified circumstances, to do certain other things, which are illegal, the first set of promises is a contract, but the second is a void agreement. Section 58 of the Indian Contract Act, 1872 provides that in the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced. Sub-rule (ii) of Rule 1 of the Rules made by the Central Government under the Notification dated 19/02/1992 states that the Rules will come into force on the date of the publication in the Official Gazette and since the date of publication in the Official Gazette is admittedly 19/02/1992, the said Rules came into force w.e.f. 19/02/1992. By 19/02/1992 even though the notice inviting bids had been issued by the Office of the Executive Engineer, the agreement between the petitioner and Executive Engineer had not been executed and the said agreement was executed only on 06/04/1992, after the said Rules came into force. If that be so, only the portions of the agreement which are not hit by the Rules notified on 19/02/1992 would be

saved and those portions of the agreement which are hit by the aforesaid Rules notified by the Central Government on 19/02/1992 would be void.

**6.** Rule 2(a) of the Rules defines "executing agency" and is quoted herein below:-

> "2. Definitions: In these rules, unless the context otherwise requires;
>
> (a) "executing agency" means:-
>
> (i) in the case of those National Highways administratively placed under the charge of the Border Roads Organisation, the Border Roads Development Board;
>
> (ii) in the case of those National Highways administratively placed under the charge of National Highways Authority, the National Highway Authority;
>
> (iii) in other cases the State Government / Union Territory Administration to which such functions are delegated under Section 5 of the Act.

It will be clear from the aforesaid definition of "executing agency" that in the case of those National Highways administratively placed under the charge of the Border Roads Organization, the Border Roads Development Board is the executing agency; in the case of those National Highways administratively placed under the charge of National Highway Authority, National Highway Authority is the executing agency and in other cases State Government/Union Territory Administration to which such functions are delegated under Section 5 of the Act, 1956 is the executing agency. Thus, in this case in respect of National Highway No. 6 located within the then State of Madhya Pradesh (now State of Chhattisgarh) the State Government was the executing agency in the year 1992. Sub-rule (10) of Rule 7 of the said Rules further provides :-

> "In case the fee collection is through a contractor (on the basis of competitive bidding) the agreement duly

executed shall provide for remittance by the contractor of the proportionate amount payable by the contractor for the period of contract atleast once every month to the executing agency / or his authorized representative."

It will be clear from the plain reading of the aforesaid provisions in Rule 7 (10) that the Rules made by the Central Government by the Notification dated 19/02/1992 provided for an agreement between a contractor and the Executing Agency for collection of fees by the contractor and remittance by the contractor to the Executing Agency. Thus, the lease agreement between the petitioner and the Executive Engineer for collection of tolls and remittance on the basis of the competitive bidding is saved by the Sub-rule (10) of Rule 7 of the Rules. Further, since the petitioner had agreed under the competitive bidding to pay the amount of Rs.46.00 lakhs out of the collection from the bridge, the petitioner will not be required to pay any amount more than Rs.46.00 lakhs. It will also be clear from Rule 3 and Rule 6 (1) of the Rules that the fees at the rates specified in the Table to the Schedule were required to be levied and collected from the vehicles crossing the bridge. Hence under the law, fees that were to be levied and collected from the vehicles crossing the bridge were not at the rates specified in the Schedule annexed to the lease agreement as fixed by the State Government, but at the rates as specified in the Table in the Schedule annexed to the Rules made by the Central Government by the Notification dated 19/02/1992. Accordingly, the provisions in the lease agreement for collection of tolls at the rates as specified in the Schedule annexed to the lease agreement were void and not enforceable. On the other hand, the petitioner was entitled and liable

to collect the fees at the rates as specified in the Table to the Schedule annexed to the Rules notified by the Central Government on 19/02/1992.

7. With the aforesaid declaration, this writ petition is disposed of. In case the petitioner has paid the full amount of Rs.46.00 lakhs as per his bid and as per the lease agreement executed between him and the Executive Engineer and there is no other valid reason for withholding the security amount furnished by the petitioner under the agreement, the security amount will be refunded to the petitioner by the authorities.

**Sd/-**
**Chief Justice**

**Sd/-**
**Sunil Kumar Sinha**
**Judge**

Subbu